SUMATHY SUBRAMANIAM v. SUBRAMANIAM GUNASEGARAN & ANOTHER APPEAL

COURT OF APPEAL, PUTRAJAYA
ABANG ISKANDAR JCA
BADARIAH SAHAMID JCA
MARY LIM JCA
[CIVIL APPEALS NO: W-03(IM)(NCC)-56-07-2016
& W-03(IM)(NCC)-65-07-2016]
20 JUNE 2017

BANKRUPTCY: *Bankruptcy notice – Validity – Appeal to set aside – Non-payment of judgment debt – Whether amount stipulated in notice exceeds what is due and owing – Whether summary judgment entered specified both judgment debtors as jointly and severally liable – Whether judgment creditor entitled to enforce full sum against both judgment debtors at same time – Whether both judgment debtors to pay sum stipulated jointly and in equal proportions – Whether sum specified in notice more than what judgment creditor was entitled to under terms of summary judgment – Whether bankruptcy notice must accord with terms of judgment – Whether debt ought to be clear and unequivocal – Whether bankruptcy notices invalid*

CIVIL PROCEDURE: *Summary judgment – Non-payment of judgment debt – Liability of judgment debtors – Whether summary judgment specified both judgment debtors jointly and severally liable – Whether liability necessarily joint when judgment is silent – Whether judgment debtors share liability equally – Whether bankruptcy notices ought to be in accord with terms of summary judgment*

The respondent sued both appellants before the Sessions Court for monies outstanding under a friendly loan arrangement. The appellant in the first appeal ('Sumathy') was sued as the principal borrower while the appellant in the second appeal ('Gunaseelan') was sued as the guarantor. The respondent entered summary judgment against both appellants. The respondent then filed two separate bankruptcy notices against both appellants and in each bankruptcy notice, the same judgment sum of RM291,800 together with the sum of RM14,504.85 as interest and the sum of RM4,000 as costs, was specified as the unpaid debt. Both appellants filed separate applications to set aside the bankruptcy notices; the ground relied on however was the same; that the sum specified therein was more than what the appellant was legally entitled to under the terms of the summary judgment. The appellants argued that given that the terms of the summary judgment did not specify that the appellants, as judgment debtors, were 'jointly and severally liable', the judgment debtors must then be equally liable for the judgment sum. In other words, each judgment debtor should only be liable for half of the judgment sum. The applications were heard by two different Senior Assistant Registrars ('SAR') and both SARs allowed the applications and the notices were set aside. The respondent appealed against

the said decision. The High Court, in allowing the appeal, found that the respondent had a cause of action against both the appellants and may pursue that line of action by either suing Gunaseelan with Sumathy in a joint action or by a separate action against them individually. Hence, this appeal by the appellants.

Held (allowing appeals)
Per Mary Lim JCA delivering the judgment of the court:

(1) The appellants were before the court to set aside the two bankruptcy notices under s. 3(2) of the Bankruptcy Act 1967. The validity of a bankruptcy notice may be challenged by a judgment debtor on the basis that there is a mistake in the amount specified in the notice. Even then, the dispute has to be that the amount stipulated in the notice exceeds that which is actually due and owing to the judgment creditor. A bankruptcy notice must accord with or follow the terms of the judgment or order. The bankruptcy notice must not deviate from those terms otherwise it risks losing its validity. (paras 9 & 18)

(2) While the respondent may be entitled to enter judgment for the same single sum, which the respondent did, the liability of them was necessarily joint. The summary judgment that was entered had not specified that both appellants were jointly and severally liable for that single sum. Where the judgment is silent or has not specified that liability is joint and several, the liability is necessarily joint. Where liability is joint, each of the judgment debtor shares that liability equally. The respondent had a right to enforce only half the judgment sum against each appellant in this case. The respondent was not entitled to enforce the full sum against both of them, certainly not at the same time. (para 12)

(3) The respondent had chosen to initiate bankruptcy proceedings against both judgment debtors at the same time and in both bankruptcy notices, the respondent claimed that the judgment debtors owed the same sum as appearing in the default judgment. In view of the quasi criminal nature of bankruptcy proceedings, the requirements of the Bankruptcy Act 1967 and the Bankruptcy Rules 1969 must be strictly complied with. A judgment debtor must be fully aware of what exactly is the act of bankruptcy that he is alleged to have committed. Where the act is over a non-payment of a judgment debt, the appellant debtor must not be left uncertain of the exact amount of the debt due. From the terms of the judgment, it could not be that both appellants were required to pay exactly the same sum. As joint debtors, each could only be required under the law and as ordered by the court, to pay the sum stipulated, jointly and in equal proportions. (para 24)

(4) The basis for petitioning a person to be adjudged a bankrupt must be done responsibly based on sound legal grounds. Since the act of bankruptcy here was the non-payment of a judgment debt, that debt must be clear and unequivocal. The summary judgment was plain when it announced both appellants liable and that their liability was joint. This court could not read or infer the appellants' liability to be joint and several as such a reading would go against the plain terms of the judgment. There were no express terms in the loan agreement indicating that the parties had agreed that the liability of the borrower and the guarantor was joint and several. It was, therefore, contrary to the contractual agreements reached between the parties if this court were to read that the liability of the appellants was joint and several. The appellants' liability though arising differently, one as the principal borrower, the other as guarantor, was proportionately for the same sum. That proportion must be spelt out when demanding for payment and when presenting a bankruptcy notice. (paras 25 & 26)

(5) The appellants could not be expected to each pay the same sum and then seek correction from the official assignee when seeking a discharge. The existence of the two bankruptcy notices with similar terms and the same amount drove home the appellants' contention that these notices were, indeed, invalid. If both appellants were to pay up the same amount as they were required to do under the bankruptcy notices, the respondent would effectively be very much overpaid. Clearly, the sum stipulated in both bankruptcy notices were inaccurate and did not accord with the terms of the summary judgment. (para 27)

Bahasa Malaysia *Headnotes*

Responden telah memulakan tindakan terhadap perayu-perayu di Mahkamah Sesyen untuk wang yang belum dijelaskan di bawah perjanjian pinjaman mesra. Perayu dalam rayuan pertama ('Sumathy') didakwa sebagai peminjam utama sementara perayu dalam rayuan kedua ('Gunaseelan') didakwa sebagai penjamin. Responden memasukkan penghakiman terus terhadap kedua-dua perayu. Responden kemudiannya memfailkan dua notis kebankrapan berasingan terhadap kedua-dua perayu dan dalam setiap notis kebankrapan, jumlah penghakiman yang sama iaitu RM291,800 bersama-sama dengan jumlah RM14,504.85 sebagai faedah dan jumlah RM4,000 sebagai kos, ditentukan sebagai hutang belum dibayar. Kedua-dua perayu memfailkan permohonan berasingan untuk mengetepikan notis kebankrapan; alasan yang diberikan adalah, walau bagaimanapun, sama; bahawa jumlah yang dinyatakan melebihi apa yang perayu berhak dari segi undang-undang bawah terma-terma penghakiman terus. Perayu-perayu menghujahkan bahawa memandangkan terma-terma penghakiman terus tidak menyatakan bahawa perayu-perayu, sebagai penghutang penghakiman, adalah 'secara bersesama dan berasingan bertanggungjawab', penghutang penghakiman sama-sama bertanggungjawab bagi jumlah penghakiman. Dalam erti kata lain, setiap

penghutang penghakiman hanya bertanggungjawab bagi separuh daripada jumlah penghakiman. Permohonan-permohonan didengar oleh dua Penolong Kanan Pendaftar yang berlainan ('Pendaftar') dan kedua-dua Pendaftar membenarkan permohonan-permohonan dan mengetepikan notis-notis kebankrapan. Responden merayu terhadap keputusan tersebut. Mahkamah Tinggi, dalam membenarkan rayuan, mendapati bahawa responden mempunyai kausa tindakan terhadap kedua-dua perayu dan boleh meneruskan tindakan dengan mendakwa Gunaseelan dengan Sumathy dalam guaman bersama atau melalui tindakan berasingan terhadap mereka secara individu. Oleh itu, rayuan ini oleh perayu-perayu.

Diputuskan (membenarkan rayuan-rayuan)
Oleh Mary Lim HMR menyampaikan penghakiman mahkamah:

(1) Perayu-perayu memohon pada mahkamah untuk mengetepikan dua notis kebankrapan bawah s. 3(2) Akta Kebankrapan 1967. Kesahihan notis kebankrapan boleh dibantah oleh penghutang penghakiman atas dasar terdapat kesilapan dalam jumlah yang dinyatakan dalam notis. Pertikaian yang timbul harus berkait dengan jumlah yang dinyatakan dalam notis melebihi apa yang sebenarnya terhutang dan belum diperjelaskan kepada pemiutang penghakiman. Notis kebankrapan harus mematuhi atau mengikuti terma-terma penghakiman atau perintah. Notis kebankrapan tidak boleh menyimpang daripada terma-terma tersebut kerana jika berbuat demikian, ia akan kehilangan kesahihannya.

(2) Walaupun responden mungkin berhak memasukkan penghakiman untuk jumlah yang sama, yang dibuat oleh responden, tanggungjawab kedua-dua perayu semestinya sama. Penghakiman terus yang dimasukkan tidak menyatakan kedua-dua perayu adalah bertanggungjawb secara bersesama dan berasingan untuk jumlah itu. Apabila tidak dinyatakan di mana-mana dalam penghakiman bahawa tanggungjawab adalah bersesama dan berasingan, tanggungjawab semestinya bersama. Di mana tanggungjawab adalah bersama, setiap penghutang penghakiman berkongsi tanggungjawab yang sama. Responden mempunyai hak untuk menguatkuasakan hanya separuh jumlah penghakiman terhadap setiap perayu dalam kes ini. Responden tiada hak untuk menguatkuasakan jumlah penuh terhadap kedua-duanya, dan pastinya bukan pada masa yang sama.

(3) Responden memilih untuk memulakan prosiding kebankrapan terhadap kedua-dua penghutang penghakiman pada masa yang sama dan dalam kedua-dua notis kebankrapan, responden mendakwa bahawa penghutang penghakiman berhutang jumlah yang sama seperti yang dinyatakan dalam penghakiman ingkar. Mengambil kira sifat separa jenayah prosiding kebankrapan, keperluan-keperluan Akta Kebankrapan 1967 dan Kaedah-Kaedah Kebankrapan 1969 perlu dipatuhi. Penghutang penghakiman harus menyedari apa sebenarnya perbuatan kebankrapan yang didakwa telah dilakukan olehnya. Di mana kelakuan berkaitan

kegagalan membayar hutang penghakiman, perayu penghutang tidak boleh dibiarkan dalam keadaan tidak menentu berkenaan jumlah sebenarnya yang terhutang. Daripada terma-terma penghakiman, tidak boleh dikatakan bahawa kedua-dua perayu perlu membayar jumlah yang sama. Sebagai penghutang bersama, masing-masing hanya dikehendaki di bawah undang-undang dan seperti yang diperintahkan oleh mahkamah, untuk membayar jumlah yang ditetapkan, secara bersesama dan atas kadar yang sama.

(4) Asas mengemukakan petisyen supaya seseorang diisytiharkan bankrap harus dibuat secara berhati-hati berdasarkan alasan-alasan undang-undang. Oleh kerana kelakuan kebankrapan di sini adalah kegagalan membayar hutang penghakiman, hutang itu harus jelas. Penghakiman terus amat jelas sekali apabila mengisytiharkan kedua-dua perayu bertanggungjawab dan liabiliti adalah bersama. Mahkamah ini tidak boleh membaca atau membuat kesimpulan liabiliti perayu-perayu sama ada bersesama atau berasingan kerana pembacaan sebegitu bertentangan dengan syarat penghakiman yang jelas. Tiada terma nyata dalam perjanjian pinjaman menunjukkan bahawa pihak-pihak telah bersetuju liabiliti peminjam dan penjamin adalah bersesama dan berasingan. Oleh itu adalah bertentangan dengan perjanjian kontrak yang dicapai oleh pihak-pihak jika mahkamah membaca bahawa liabiliti perayu-perayu adalah bersesama dan berasingan. Liabiliti perayu-perayu walaupun timbul secara berbeza, satu sebagai peminjam utama dan satu lagi sebagai penjamin, adalah untuk jumlah yang sama. Perkadaran itu harus dinyatakan apabila menuntut bayaran dan apabila menyampaikan notis kebankrapan.

(5) Perayu-perayu tidak boleh dijangkakan untuk masing-masing membayar jumlah yang sama dan kemudiannya memperoleh pembetulan daripada pemegang serah hak apabila menuntut pelepasan. Kewujudan dua notis kebankrapan dengan istilah yang serupa dan jumlah yang sama menyokong hujahan perayu-perayu bahawa notis-notis ini memang tidak sah. Jika kedua-dua perayu membayar jumlah yang sama seperti yang diperlukan notis-notis kebankrapan, responden dengan secara berkesan akan dibayar lebih. Dengan jelasnya jumlah yang dinyatakan dalam kedua-dua notis kebankrapan tidak tepat dan tidak mematuhi terma-terma penghakiman terus.

Case(s) referred to:

Alliance Bank Malaysia Bhd v. Mukhriz Mahathir & Anor [2006] 2 CLJ 723 HC ***(refd)***

In Re Dato' Dr Elamaran M Sabapathy; ex p RHB Bank Bhd [2011] 10 CLJ 262 HC ***(refd)***

J Raju M Kerpaya v. Commerce International Merchant Banker Bhd [2000] 3 CLJ 104 CA ***(refd)***

Lim Koon Chow v. AmBank (M) Bhd [2012] 4 CLJ 624 HC ***(refd)***

Re Abu Bakar Ismail; Ex p Alliance Investment Bank Bhd [2011] 1 LNS 1688 HC ***(refd)***

Yeo Ah Wang v. UMBC Bhd [1995] 1 AMR 38 ***(refd)***

Legislation referred to:
Bankruptcy Act 1967, s. 3(1)(i), (2)

For the appellant - M Manoharan & Paralakodi Nadarajah; M/s M Manoharan & Co
For the respondent - S Prema Subramaniam; M/s Sumitra Prema & Assocs

[Editor's note: Appeal from High Court, Kuala Lumpur; Bankruptcy Cases No: 29NCC-5265-11-2015 & 29NCC-5272-11-2015 (overruled).]

Reported by Suhainah Wahiduddin

JUDGMENT

Mary Lim JCA:

[1] These two appeals, Civil Appeal No: W-03(IM)(NCC)-56-07-2016 (first appeal) and Civil Appeal No: W-03(IM)(NCC)-65-07-2016 (second appeal) were heard together just as they were similarly heard in the court below since they arose from the same facts and involved common parties. We allowed the appeals after considering the submissions of both learned counsel. These are our reasons.

Background Facts

[2] The respondent sued both appellants before the Sessions Court at Kuala Lumpur in Civil Action No: A52NCC-362-02-2015 for monies outstanding under a friendly loan arrangement of RM325,800. The appellant in the first appeal, Sumathy a/p Subramaniam (Sumathy) was sued as the principal borrower while the appellant in the second appeal, Gunaseelan a/l Tangiah (Gunaseelan) was sued as the guarantor. On 4 September 2016, the respondent entered summary judgments against both appellants. The terms of the summary judgment which is the same in respect of both appellants *inter alia* are as follows:

> Defendan hendaklah membayar kepada plaintif iaitu Jumlah Penghakiman sebanyak RM291,800.00, faedah pada kadar 5% setahun dari tarikh 22.11.2014 hingga tarikh Penghakiman, faedah pada kadar 5% setahun dari tarikh Penghakiman sehingga penyelesaian penuh dan kos sebanyak RM4,000.00.

[3] On 16 November 2015, the respondent filed two separate bankruptcy notices against both appellants. In each bankruptcy notice, the same judgment sum of RM291,800 together with the sum of RM14,504.85 as interest at the rate of 5% per annum and the sum of RM4,000 as costs, was specified as the unpaid debt. The total sum being RM310,304.85.

[4] On 26 January 2016, both appellants filed separate applications to set aside the bankruptcy notices; the ground relied on however, was the same; that the sum specified therein was more than what the respondent was legally entitled to under the terms of the summary judgment. The appellants argued

that given that the terms of the summary judgment did not specify that the appellants, as judgment debtors were "jointly and severally liable", the judgment debtors must then be equally liable for the judgment sum. In other words, each judgment debtor should only be liable for half of the judgment sum.

[5] The applications were heard by two different Senior Assistant Registrars on 30 March 2016. Both learned SARs allowed the applications and the notices were set aside. According to the learned High Court Judge, the learned SARs were of the view that the judgment obtained by the respondent/judgment creditor or JC was "open-ended as it did not specifically state the exact amount or portion that each JDs is liable. Further, both the learned Senior Assistant Registrars are of the view that the amount owed should be divided equally between the JDs". The respondent appealed.

Decision Of The High Court

[6] The High Court allowed the appeal. It was the finding of the High Court that since Gunaseelan had guaranteed repayment of the loaned sum under the friendly loan agreement dated 30 June 2011 ("the loan agreement"), the respondent was entitled to sue both Gunaseelan and Sumathy in the event Sumathy did not pay. The respondent had a cause of action against both of the appellants and it may pursue that line of action by either suing Gunaseelan with Sumathy in a "joint action", or by a "separate action against them individually". Consequently, the summary judgment that was entered against them "can be enforced against any one or both the JDs". The learned High Court Judge added that since the summary judgment referred to Sumathy and Gunaseelan as "defendant", the respondent "can proceed with one action against both the JDs at the same time or two separate actions against both of them individually. The cause of action against any one of the JDs is not discharged if judgment (*sic*) entered against the other". Her Ladyship adopted the decision in *Lim Koon Chow v. AmBank (M) Sdn Bhd* [2012] 4 CLJ 624; [2012] MLJU 13, holding that Gunaseelan was liable, as a guarantor, to pay the whole sum in the event Sumathy failed to pay the loan sum or the sum stated in the judgment. Finally, Her Ladyship held that "how much each of the JDs has to pay from the whole amount stated in the judgment will only be relevant if they (the JDs) apply for their discharge from the bankruptcy which will come under the purview and consideration of the official assignee and the JC as creditor in the bankruptcy".

Our Decision

[7] With respect, we cannot agree with the learned High Court Judge. While the remarks and observations of the learned High Court Judge on the general principles were correct, Her Ladyship had fallen into error in failing to examine the real issue under consideration.

[8] The appellants were before the court to set aside the two bankruptcy notices. In order to do that successfully, the appellants will have to show that they have valid challenges under sub-s. 3(2) of the Bankruptcy Act 1967. Section 3(1) deals with the various acts which under the law, amounts to acts of bankruptcy while sub-s. 3(2) deals specifically with the contents of a bankruptcy notice. Subsection 3(2) reads as follows:

> (2) A bankruptcy notice under this Act shall be in the prescribed form and shall state the consequences of non compliance therewith and shall be served in the prescribed manner:
>
> Provided that a bankruptcy notice:
>
> (i) may specify an agent to act on behalf of the creditor in respect of any payment or other thing required by the notice to be made to or done to the satisfaction of the creditor; and
>
> (ii) *shall not be invalidated by reason only that the sum specified in the notice as the amount due exceeds the amount actually due unless the debtor within the time allowed for payment gives notice to the creditor that he disputes the validity of the notice on the ground of such mistake*; but if the debtor does not give such notice he shall be deemed to have complied with the bankruptcy notice, if within the time allowed he takes such steps as would have constituted compliance with the notice had the actual amount due been correctly specified therein.
>
> (emphasis added)

[9] From the terms of sub-s. 3(2), it is evident that the validity of a bankruptcy notice may be challenged by a judgment debtor on the basis that there is a mistake in the amount specified in the notice. Even then, the dispute has to be that the amount stipulated in the notice exceeds that which is actually due and owing to the judgment creditor. But before the judgment debtor can raise that dispute, the judgment debtor is required to notify the judgment creditor within the time prescribed. In *J Raju M Kerpaya v. Commerce International Merchant Banker Bhd* [2000] 3 CLJ 104, this court had decided that:

> A debtor who seeks to challenge a bankruptcy notice on the ground that the amount specified therein exceeds the amount actually due, must act in accordance with proviso (i) to section 3(2) of the Act. Hence, he must, within the time prescribed in the bankruptcy notice give notice in writing to the creditor that he disputes the validity of the notice on the ground that it mistakenly claims an amount larger than that lawfully due.

[10] That time period is to be found in sub-s. 3(1)(i) which reads:

> (i) if a creditor has obtained a final judgment or final order against him for any amount and execution thereon not having been stayed has served on him in Malaysia, or by leave of the court elsewhere, a bankruptcy notice under this Act requiring him to pay the judgment debt or sum ordered to be paid in accordance with the terms of the

A judgment or order with interest quantified up to the date of issue of the bankruptcy notice, or to secure or compound for it to the satisfaction of the creditor or the court; and he does not within seven days after service of the notice in case the service is effected in Malaysia, and in case the service is effected elsewhere then within the time limited in that behalf by the order giving leave to
B effect the service, either comply with the requirements of the notice or satisfy the court that he has a counterclaim, set off or cross demand which equals or exceeds the amount of the judgment debt or sum ordered to be paid and which he could not set up in the action in which the judgment was obtained or in the proceedings in which the order was obtained:
C

> Provided that for the purposes of this paragraph and of section 5 any person who is for the time being entitled to enforce a final judgment or final order shall be deemed to be a creditor who has obtained a final judgment or final order;

D **[11]** In the instant appeals, there are no procedural complaints. What concerns both appellants is the amount specified in the respective notices. Both appellants dispute the amount therein.

[12] It is the argument of both appellants that while the respondent may be entitled to enter judgment for the same single sum, which the respondent did,
E the liability of each of them is necessarily joint. This is because, the summary judgment that was entered has not specified that both appellants are jointly and severally liable for that single sum. Where the judgment is silent or has not specified that liability is joint and several, the liability is necessarily joint. Where liability is joint, each of the appellant as defendant, shares that
F liability equally - see *In Re Dato' Dr Elamaran M Sabapathy; ex p RHB Bank Bhd* [2011] 10 CLJ 262. And so, when it comes to enforcing the judgment, the respondent has a right to enforce only half the judgment sum against each appellant. The respondent is not entitled to enforce the full sum against both of them, certainly not at the same time.

G **[13]** We agree with the submissions of learned counsel for the appellants.

[14] The starting principle in insolvency applications is the act of bankruptcy. The purported act of bankruptcy here is the unpaid judgment debt. A summary judgment, as is the case here, has equal force and validity with any judgment pronounced after a full trial. That judgment, regardless
H summary or final, until it is varied or set aside, forms the bedrock of the order adjudicating an individual person as a bankrupt. We must stress that in dealing with the issue of whether the appellants have raised a proper dispute under sub-s. 3(2) of the Bankruptcy Act as to the validity of the bankruptcy notices, we make no determination on the merits of the summary
I judgments entered or even on the respondent's cause of action against the appellants. The cause of action has merged in the summary judgments entered and these judgments are final and binding on, especially the appellants.

[15] The terms of any judgment order is entirely one of discretion of court though in a summary judgment, those terms generally follow the terms sought by the plaintiff. In this case, the respondent, as plaintiff, entered summary judgment in terms as appearing in its statement of claim. The relevant terms of the summary judgment have already been set out above. The issue is the nature of each appellant's liability in meeting the judgment sum. Following from that is the issue of whether the sum expressed in the bankruptcy notices is more than the sum actually owed by each appellant under the judgment.

[16] As expressed by Varghese George JC (as he then was) in *Re Dato Elamaran M Sabapathy; ex p RHB Bank Bhd* (*supra*), "in the absence of the judgment spelling out expressly that the defendants were jointly and severally liable to the plaintiff, the judgment there has, as in the ordinary course, to be a judgment imposing joint liability or obligation on the three defendants to meet the judgment sum together. In such event, the JD's obligation is only one-third the amount of the judgment sum and not as set out in the bankruptcy notice, or for that matter in the creditor's petition."

[17] In coming to his decision, Justice Varghese George had relied on an earlier decision of *Yeo Ah Wang v. UMBC Bhd* [1995] 1 AMR 38. In *Yeo Ah Wang v. UMBC Bhd*, Shaik Daud J (as he then was) had similarly held that since the judgment was obtained against all three defendants in that case, the defendants were jointly liable. Consequently, the bankruptcy notice which was issued against only one defendant and even then it was for the whole of the judgment sum was set aside as it was not in accord with the terms of the judgment:

> Dalam rayuan ini mahkamah mendapati sebenarnya penghakiman bertarikh Ogos 8, 1992, itu adalah terhadap tiga defendan dan ketiga-tiga mereka diperintahkan sesama membayar sejumlah wang kepada plaintif. Oleh itu mahkamah bersetuju bahawa dengan plaintif mengeluarkan notis kebankrapan terhadap salah seorang defendan sahaja adalah satu tindakan yang tidak mengikuti atau berdasarkan penghakiman tersebut.

[18] It was His Lordship's view that a bankruptcy notice must accord with or follow the terms of the judgment or order. The bankruptcy notice must not deviate from those terms otherwise it risks losing its validity.

[19] We agree with that reasoning. It is precisely because a successful plaintiff, who subsequently stands as a judgment creditor, does not wish to find himself in the position that would result where liability is joint, that he may only seek recovery in equal proportions against each defendant, that he negotiates on terms of joint and several liability. That nature of liability is carried through to enforcement of any judgment that may be entered. But, where those are not the terms of contract or the pleaded case, or worse, where the judgment is not entered on terms of the defendants being jointly and severally liable, the court, in particular the enforcement court, cannot

be called to address and interpret the judgment in terms which are simply not there. That would require the court to go behind the judgment and as stated earlier, quite apart from that not being the function of the enforcement court, the cause of action has already merged into the judgment obtained.

[20] This, therefore, puts paid to the respondent's contention that because Gunaseelan is a guarantor to the friendly loan given by the respondent to Sumathy, Gunaseelan is jointly and severally liable with Sumathy, the principal debtor; and that that position remains until enforcement of the judgment. Gunaseelan is liable to pay the whole judgment sum inasmuch as Sumathy is, especially where Sumathy has not made any payments, and that he is not discharged and he must pay the full sum relying on *Alliance Bank Malaysia Bhd v. Mukhriz Mahathir & Anor* [2006] 2 CLJ 723.

[21] Having examined the decision in *Alliance Bank Malaysia Berhad*, it is clear that the decision is not directly on point. In that case, judgment in default was entered against one of two defendants. Although the claim against the defendants was premised on joint and several liability, that was not reflected in the reliefs sought and in the default judgment that was entered. The plaintiff later sought to proceed with its action against the other defendant. It was in defence to this later action that the principle of joint and several liability was discussed. It was the view of Ramly Ali J (as he then was) that:

> The fact that the said judgment in default dated 25 January 2005 against the 2nd defendant as well as the prayer in the plaintiff's Statement of Claim do not state or insert the words "jointly and severally" does not in any way change the position. The plaintiff's right on the cause of action against both the defendants either jointly or individually (ie, severally) still survives. The plaintiff can always proceed against the 1st defendant even though a final judgment in default had been entered against the 2nd defendant.

[22] Similarly, the facts and circumstances in *Lim Koon Chow v. AmBank (M) Bhd* [2012] 4 CLJ 624; [2012] MLJU 13 are quite different. There, the High Court was asked to set aside a bankruptcy notice on the basis that the sum stipulated therein was not due and recoverable from the judgment debtor as the entire bankruptcy proceedings was premised upon a joint judgment by the learned JC against the judgment debtor and two others. After examining the terms of the judgment, the learned High Court Judge held that the bankruptcy notice was valid because:

> As for me I cannot see how a judgment entered against all 3 defendants … cannot be enforced against anyone or more or all of them for the words of the Judgment when translated into English read:
>
> > IT IS THIS DAY ADJUDGED that the First Defendant, the Second Defendant and the Fourth Defendant do pay the Plaintiff:
> >
> > (i) the sum of RM21,615,617.23 …

The JC always has a choice to decide which of the 3 defendants to proceed against with respect to execution.

[23] In an earlier decision of *Re Abu Bakar Ismail; Ex Parte Alliance Investment Bank Berhad* [2011] 1 LNS 1688, Justice Lee Swee Seng took the view that "even without the words "jointly and severally" in the body of the judgment, there is no ambiguity as to how much the plaintiff as judgment creditor can proceed against each one of the judgment debtor either alone or together or against all the three of them." His Lordship opined that "for purposes of discharged as a bankrupt later on, it would of course be relevant that there are other judgment debtors for the same debt who perhaps have not contributed towards payment of the judgment debtor and that the JD here has been shouldering the brunt and the full burden of it. The official assignee can of course take this into consideration in consenting to the JD's application to be discharged." On the insistence of the JD, His Lordship then proceeded to take "a cursory glance at the pleading"; and having done so, concluded that "any ambiguity alleged quickly vaporises."

[24] In the present appeals, the respondent chose to initiate bankruptcy proceedings against both judgment debtors at the same time. In both bankruptcy notices, the respondent claimed that the judgment debtor owes the same sum as appearing in the summary judgment. In view of the *quasi*-criminal nature of bankruptcy proceedings, the requirements of the Bankruptcy Act 1967 and the Bankruptcy Rules 1969 must be strictly complied with. A judgment debtor must be fully aware of what exactly is the act of bankruptcy that he is alleged to have committed. Where the act is over a non-payment of a judgment debt, the appellant debtor must not be left uncertain of the exact amount of the debt due. From the terms of the judgment, it cannot be that both appellants are required to pay exactly the same sum. As joint debtors, each can only be required, under the law and as ordered by the court, to pay the sum stipulated, jointly and in equal proportions.

[25] We cannot agree with the learned High Court Judge who found that the amount that each appellant, as judgment debtor, is required to pay is only relevant at the time of discharge, and not at the time of issuance of the bankruptcy notice or even the creditor's petition. The adjudication of any person as a bankrupt is a serious and sombre act; it has far-reaching effects, affecting not just the person's daily affairs, doing of business or occupation but also his movements, especially egress and ingress of the country. The basis for petitioning a person to be adjudged a bankrupt must be done responsibly based on sound legal grounds. Since the act of bankruptcy here is the non-payment of a judgment debt, that debt must be clear and unequivocal. From our reading of the terms of the summary judgment, it cannot convey the meaning that the respondent claims, that the appellants are

jointly and severally responsible for the non-payment of the loan. The loan agreement in question does not provide for such terms, neither does the respondent's statement of claim including its reliefs and certainly, not in the summary judgment.

[26] From what we can see of the summary judgment dated 4 September 2015, it is plain that it pronounces both appellants liable and that their liability is joint. We cannot read or infer the appellants' liability to be joint and several as such a reading would go against the plain terms of the judgment. In any event, there are no express terms in the loan agreement indicating that the parties have agreed that the liability of the borrower and the guarantor is joint and several. It would therefore be contrary to the contractual arrangements reached between the parties if this court were to read that the liability of the appellants is joint and several. As co or joint defendants, the appellants' liability though arising differently, one as the principal borrower, the other as guarantor, is proportionately for the same sum. That proportion must be spelt out when demanding for payment and when presenting a bankruptcy notice.

[27] The appellants cannot be expected to each pay the same sum and then seek correction from the official assignee when seeking a discharge. The existence of the two bankruptcy notices with similar terms and the same amount drives home the appellants' contention that these notices are indeed, invalid. If both appellants were to pay up the same amount as they are required to do under the bankruptcy notices, the respondent would effectively be very much overpaid. Clearly, the sum stipulated in both bankruptcy notices are inaccurate and do not accord with the terms of the summary judgment.

Conclusion

[28] For all the reasons adumbrated above, we unanimously allowed both the appeals. The decisions of the learned High Court Judge in respect of both appeals are set aside and the decisions of the learned SAR are restored.